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## Touro Law Review

Volume 18  
Number 2 *New York State Constitutional  
Decisions: 2001 Compilation*

Article 21

March 2016

### Supreme Court, Kings County, People v. Ortiz

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#### Recommended Citation

Kronenberg, Robert (2016) "Supreme Court, Kings County, People v. Ortiz," *Touro Law Review*. Vol. 18 : No. 2 , Article 21.

Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol18/iss2/21>

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# SUPREME COURT OF NEW YORK

## KINGS COUNTY

People v. Ortiz<sup>1</sup>  
(decided August 20, 2001)

On July 9, 2001, a *Wade*,<sup>2</sup> *Payton*,<sup>3</sup> *Dunaway*<sup>4</sup> hearing was held with respect to defendant Ortiz's motion to suppress evidence of identification testimony on the ground that the police unlawfully entered his home and arrested him without probable cause or a warrant.<sup>5</sup> The court granted Ortiz's motion to suppress the testimony of Police Officer Stephen Hom and the complainant regarding observations they made while inside the defendant's home, including any out-of-court identification made of the defendant. However, the court denied the defendant's motion to suppress any in-court identification by the complainant.<sup>6</sup>

The defendant's motion to suppress the testimony of Police Officer Hom and the complainant was based upon the protections afforded to individuals against unreasonable search and seizure as

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<sup>1</sup> No. 8364-00, 2001 N.Y. Misc. LEXIS 337 (Sup. Ct. Kings County August 20, 2001).

<sup>2</sup> *U.S. v. Wade*, 388 U.S. 218 (1967). *See* *People v. Dixon*, 85 N.Y.2d 218, 222; 647 N.E.2d 1321, 1323; 623 N.Y.S.2d 813, 815 (1995) (holding that the purpose of a *Wade* hearing is "to test identification testimony for taint arising from official suggestion during police-arranged confrontations between a defendant and an eyewitness." citing *People v. Gissendanner*, 48 N.Y.2d 543, 552, 399 N.E.2d 924, 930, 423 N.Y.S.2d 893 (1979)).

<sup>3</sup> *Payton v. New York*, 445 U.S. 573 (1980). *See* *In the Matter of Demetrius W.*, 126 Misc. 2d 440, 443, 481 N.Y.S.2d 955, 958 (N.Y. Family Ct. 1984) (stating that "the *Payton* rule prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest").

<sup>4</sup> *Dunaway v. New York*, 442 U.S. 200 (1979). *See* *Dawson v. Donnelly*, 111 F. Supp. 2d 239 (W.D.N.Y. 2000) (stating that as per *Dunaway*, a confession obtained after an arrest without probable cause was inadmissible at trial).

<sup>5</sup> *Ortiz*, 2001 N.Y. Misc. LEXIS 337 at \*1.

<sup>6</sup> *Id.* Police Officer Hom was one of four officers to arrive at the defendant's home. Officer Hom waited outside after the defendant's stepdaughter invited the other three officers in. After being summoned by one of the officers already in the defendant's home, Officer Hom and the complainant entered the defendant's home without permission of the defendant or any other person residing in the household. *Id.*

set forth in the Federal<sup>7</sup> and New York State<sup>8</sup> Constitutions.<sup>9</sup> The *Ortiz* court held that the warrantless entry into the defendant's home by the initial three initial officers was lawful.<sup>10</sup> However, the warrantless entry into the defendant's home by Officer Hom, accompanied by the complainant was a violation of the defendant's federal<sup>11</sup> and state<sup>12</sup> constitutional right to be free from unreasonable searches and seizures.<sup>13</sup>

Police initially responded to a radio run of a past assault in Brooklyn.<sup>14</sup> Upon their arrival at the scene, the officers were approached by a 14 year old complainant, Hector Ramos, who informed them that an "intoxicated older male Hispanic wearing blue jeans and a gray T-shirt approached him on the street about ten minutes prior, unzipped Ramos' pants, and fondled his penis."<sup>15</sup> Ramos informed the police that the man who assaulted him went into a residential building located on Seventh Avenue.<sup>16</sup> Police Officer Caesar, Police Officer Wolf, and Sergeant Walton approached the building described by Ramos and knocked on the front door.<sup>17</sup> A teenaged girl opened the door and the officers described the suspect.<sup>18</sup> She informed the officers that the description they gave her was of her stepfather.<sup>19</sup> The police asked her if they could speak with her stepfather and she said "yes," and

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<sup>7</sup> U.S. CONST. amend. IV provides in pertinent part: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated . . . ."

<sup>8</sup> N.Y. CONST. art. I, § 12 which provides in pertinent part: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . . ."

<sup>9</sup> *Ortiz*, 2001 N.Y. Misc. LEXIS 337 at \*6.

<sup>10</sup> *Ortiz*, 2001 N.Y. Misc. LEXIS 337 at \*4 ("[T]heir entry was based on the express and voluntary consent of the teenaged occupant who answered the door and identified herself to the officers as the defendant's stepdaughter.").

<sup>11</sup> U.S. CONST. amend. IV.

<sup>12</sup> N.Y. CONST. art. I, § 12.

<sup>13</sup> *Ortiz*, 2001 N.Y. Misc. LEXIS 337 at \*6.

<sup>14</sup> *Id.* at \*1.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at \*2.

<sup>17</sup> *Id.*

<sup>18</sup> *Ortiz*, 2001 N.Y. Misc. LEXIS 337 at \*\*2-3.

<sup>19</sup> *Id.* at \*3.

invited the three officers inside the apartment.<sup>20</sup> Officer Hom was waiting outside with the complainant and brought the complainant into the house to the room where the defendant was sitting.<sup>21</sup> Neither the defendant nor his stepdaughter, nor any other member of the defendant's household had given Officer Hom or the complainant permission to enter the house.<sup>22</sup> Upon seeing the defendant, the complainant stated: "That's the guy that did it to me."<sup>23</sup> Ortiz was then arrested.<sup>24</sup>

The court commenced its analysis by determining that the initial entry of the officers into the defendant's home was lawful because the entry was based on the express and voluntary consent of the defendant's stepdaughter.<sup>25</sup> However, the consent granted to the initial officers did not extend to the later entry by Officer Hom and the complainant.<sup>26</sup> Therefore, because the entry of the three initial officers was lawful, they were permitted to testify as to observations they made of the defendant. However, due to lack of consent, neither Officer Hom nor the complainant would be allowed to testify as to observations they made of the defendant, including the complainant's identification of the defendant at that time.<sup>27</sup>

In recognizing the facts of this case to be unique, the court, stated: "research has failed to disclose a reported case where particular police officers obtained consent to enter a home and then, without obtaining further consent, invited other police officers and civilians for the purpose of making an identification."<sup>28</sup> The court therefore analyzed the actions of the officers by comparing the facts of the instant case to "cases where a suspect has consented to a search of a particular area, but the police extended their search beyond the scope of the suspects

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at \*\*3-4.

<sup>22</sup> *Id.* at \*4.

<sup>23</sup> *Ortiz*, 2001 N.Y. Misc. LEXIS 337, at \*4.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at \*5.

<sup>26</sup> *Id.* at \*6.

<sup>27</sup> *Id.* at \*5.

<sup>28</sup> *Ortiz*, 2001 N.Y. Misc. LEXIS 337, at \*6.

consent.”<sup>29</sup> Citing *Florida v. Jimeno*,<sup>30</sup> the *Ortiz* court stated: “the standard for measuring the scope of a suspect’s consent is that of objective reasonableness.”<sup>31</sup>

In *Jimeno*, the defendant was stopped for a traffic violation.<sup>32</sup> The defendant gave the officer permission to search the automobile, and upon doing so, the officer found a paper bag containing cocaine.<sup>33</sup> The *Jimeno* Court held that “it was objectively reasonable for the police to conclude that the general consent to search respondent’s car included consent to search containers within the car . . . .”<sup>34</sup>

Likewise, in *People v. Mitchell*,<sup>35</sup> the defendant consented to a search of his automobile by stating to the police, “you can look through anything you want. It’s not my car.”<sup>36</sup> In *Mitchell*, the defendant placed no limitation on the police search of the automobile.<sup>37</sup> Based on the defendant’s unqualified consent, the police were free to search the entire automobile. However, the *Ortiz* court, in comparing the facts of *Mitchell* stated, it was unreasonable for additional uninvited police officers and civilians to enter the defendant’s apartment simply because the defendant’s stepdaughter granted the initial officers permission to enter the apartment. This consent was in effect consent limited to the initial officers.<sup>38</sup>

The defendants in *Jimeno* and *Mitchell* provided the officers with unlimited permission to search their automobiles. However, in *Ortiz* the permission granted by the defendant’s stepdaughter was inherently limited to the initial officers and did

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<sup>29</sup> *Id.*

<sup>30</sup> 500 U.S. 248 (1991).

<sup>31</sup> *Ortiz*, 2001 N.Y. Misc. LEXIS 337 at \*7. See *Florida v. Jimeno*, 500 U.S. 248, 251 (1991) (“[T]he standard for measuring the scope of a suspect’s consent under the Fourth Amendment is that of ‘objective’ reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the subject?”).

<sup>32</sup> *Jimeno*, 500 U.S. at 249.

<sup>33</sup> *Id.* at 250.

<sup>34</sup> *Id.* at 251.

<sup>35</sup> 211 A.D.2d 553, 621 N.Y.S.2d 581 (1st Dep’t 1995).

<sup>36</sup> *Id.* at 553, 621 N.Y.S.2d at 582.

<sup>37</sup> *Id.* at 554, 621 N.Y.S.2d at 582.

<sup>38</sup> *Ortiz*, 2001 N.Y. Misc. LEXIS 337 at \*7.

not automatically extend to officers who did not receive the same permission to enter the apartment. In other words, the entry of Officer Hom and the complainant into the defendant's home was not objectively reasonable, because a reasonable person in the *Ortiz* case would have understood the conversation between the initial officers and the stepdaughter did not extend to any other officers or civilians. Consequently, testimony given by Officer Hom and the complainant regarding anything that occurred inside the defendant's home, including the complainant's identification of the defendant, was inadmissible.<sup>39</sup>

Similarly, in *United States v. Snow*,<sup>40</sup> defendant consented to a search of his automobile by police officers.<sup>41</sup> Defendant sought to suppress evidence found in the car on the ground that his consent to a search of his car did not extend to the closed paper bag found inside the car.<sup>42</sup> The court held "that an individual who consents to the search of his car should reasonably expect that . . . containers discovered inside the car will be opened and examined," explaining that "if the consent to search is entirely open-ended, a reasonable person would have no cause to believe that the search will be limited in some way."<sup>43</sup> In contrast, in *Ortiz*, the stepdaughter's consent to allow the first three officers to enter into defendant's home would not lead a reasonable person to believe that her consent would be extended to the complainant or any later responding officers. It was not an open-ended invitation in that her consent was directed at specific officers.

The facts of *Ortiz* are distinguishable from the facts in *Mitchell*, *Snow* and *Jimeno*, in that the stepdaughter's consent in *Ortiz*, did not apply as broadly as the consent given by the defendants in *Mitchell*, *Snow* and *Jimeno*.<sup>44</sup> Likewise, the court in

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<sup>39</sup> *Id.* at \*2.

<sup>40</sup> 44 F.3d 133 (2d Cir. 1995).

<sup>41</sup> *Id.* at 134.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 135; see also *People v. Flores*, 181 A.D.2d 570, 581 N.Y.S.2d 58 (1st Dep't 1992) (holding an invitation to enter a dwelling cannot reasonably be construed as a broad consent for the police to wander at will throughout the entire dwelling).

<sup>44</sup> see *Jimeno*, 500 U.S. at 251 ("The scope of a search is generally defined by its expressed object.").

*People v. Cohen*<sup>45</sup> held that the defendant's consent to the initial entry by police into her home to investigate a possible suicide did not extend to the entry made by police on the following morning to investigate what the police then believed to be a possible homicide.<sup>46</sup> Although the initial police entry in *Cohen* was based upon the emergency doctrine, "there was no basis in the evidence for the application of the emergency doctrine to justify re-entry."<sup>47</sup> In *Cohen* as in *Ortiz*, the police exceeded the scope of permission granted to enter a defendant's home.

The *Ortiz* court relied upon the holdings of the Second and Fourth Departments in its analysis. In *People v. Jakubowski*,<sup>48</sup> the court held, "the scope of the search . . . must be limited strictly to the terms of the consent."<sup>49</sup> Similarly, in *People v. Grajales*,<sup>50</sup> investigators "obtained permission from the defendant to conduct a limited search for immigration documents in the defendant's home."<sup>51</sup> The court held that "this limited consent . . . dissipated upon the recovery of the valid passports from the dresser."<sup>52</sup> Since the sole purpose of the search was to find documents pertaining to alien status, the search should have terminated once the documents were found.<sup>53</sup>

In conclusion, the Federal and New York State Constitutions are essentially identical in language; providing for the protection of individuals against unreasonable searches and seizures.<sup>54</sup> Furthermore, when determining whether a police officer exceeds the scope of a search based upon consent, both the federal

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<sup>45</sup> 58 N.Y.2d 844, 446 N.E.2d 774, 460 N.Y.S.2d 18 (1983).

<sup>46</sup> *Id.* at 846.

<sup>47</sup> *Id.*

<sup>48</sup> 100 A.D.2d 112, 116, 472 N.Y.S.2d 853, 857 (4th Dep't 1984).

<sup>49</sup> *Id.* at 116, 472 N.Y.S.2d at 586 ("[S]earches have been held invalid where the police have exceeded the consent which was limited to a search for a particular purpose . . .") *see also* *Walter v. United States* 447 U.S. 649 (1980) (holding when an official search is properly authorized, whether by consent or by the issuance of a valid warrant, the scope of the search is limited by the terms of its authorization)..

<sup>50</sup> 136 A.D.2d 564, 523 N.Y.S.2d 560 (2d Dep't 1988).

<sup>51</sup> *Id.* at 564-65, 523 N.Y.S.2d at 561.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 565, 523 N.Y.S.2d at 561.

<sup>54</sup> *See* U.S. CONST. amend. IV; *see also*, N.Y. CONST. art. I § 12.

and New York State courts rely upon the standard of objective reasonableness.<sup>55</sup> In *Ortiz*, the court applied the standard of objective reasonableness to an exchange between the police and an occupant of the defendant's residence.<sup>56</sup> Similarly, as in *Ortiz*, the New York courts in other state cases have consistently held that searches must be limited to the terms of the consent.<sup>57</sup> Both federal and state law interprets the scope of police searches conducted with consent to be controlled by the objective reasonableness standard.<sup>58</sup>

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<sup>55</sup> See *Jimeno*, 500 U.S. at 251; see also *Snow*, 44 F.3d at 134; *Mitchell*, 211 A.D.2d at 554, 621 N.Y.S.2d at 583.

<sup>56</sup> See *Ortiz*, 2001 N.Y. Misc. LEXIS 337 at \*5 ("The stepdaughters limited consent to the entry of three police officers into an apartment cannot reasonably be deemed to be an open invitation for more police officers, and any civilians they wished to accompany them, to enter into the premises at a future time.").

<sup>57</sup> See *Jakubowski*, 100 A.D.2d at 116, 472 N.Y.S.2d at 857 ("[T]he scope of the search . . . must be limited strictly to the terms of the consent."); see also *Mitchell*, 211 A.D.2d at 554, 621 N.Y.S.2d at 582 (holding a police search of defendant's entire vehicle to be proper because the defendant had not limited the scope of the search).

<sup>58</sup> See, e.g., *Jimeno*, 500 U.S. at 251, *Mitchell*, 211 A.D.2d at 554, 621 N.Y.S.2d 583; *Snow*, 44 F.3d at 138.



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